

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-178

██████████
E-7

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the application upon receipt of the completed application and military records on July 19, 2018, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 1, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a ██████████ on the Inactive Status List (ISL) in the Coast Guard Reserve, asked the Board to correct the Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate (form CG-11221) that he and his spouse completed and signed before a notary public on May 15, 2014.¹ Specifically, he asked the Board to correct the form to show that he elected Option B, instead of Option A, and thus chose standard coverage for his spouse based on his full retired pay beginning at age 60, instead of declining to elect coverage until age 60.

The applicant, who will turn 60 years old in ██████████ 2025, stated that he and his spouse “never realized that selection of this option [Option A] would result in forfeiture of survivor benefits in the event of my death before reaching age 60. We have been married for almost 32 years and would never have elected on option that would deprive my wife of survivor benefits in the

¹ Under 10 U.S.C. § 1448, members who are entitled to receive retired pay are eligible to participate in the Survivor Benefit Plan (SBP). The SBP provides an annuity to their survivors, and the premiums for the annuity are deducted from their retired pay. Because reservists usually enter retired status before they become eligible for retired pay—normally at age 60—there is a special RCSBP that provides coverage for the survivors of participating reservists who die before they are eligible to receive retired pay, and the extra premiums for this coverage are paid only if the reservist survives long enough to receive retired pay from which the premiums can be deducted. Thus, under the RCSBP, the survivors of participating reservists who die before age 60 receive an annuity that is substantially paid for by premiums deducted from the retired pay of participating reservists who do not die before age 60.

event of my death before I reached age 60.” The applicant alleged that he discovered the error in his record on March 6, 2018, but did not explain the circumstances of that discovery.

The applicant provided copies of the original RCSBP Election Certificate (form CG-11221) that he and his spouse signed and had notarized on May 15, 2014, and a proposed replacement RCSBP Election Certificate that they signed on March 12, 2018. The three options in block 12 on the RCSBP Election Certificates appear as follows:

OPTION A. I decline to make an election until the date I am eligible to draw retired pay (normally age 60). (*NOTE: Do not select type of coverage below.*)

OPTION B (DEFERRED ANNUITY). I elect to provide an annuity beginning on the date I am eligible to draw retired pay (normally age 60) should I die before that date, or on the day after date of death should I die on or after my becoming eligible to draw retired pay. (*Select type of coverage below.*)

OPTION C (IMMEDIATE ANNUITY). I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after I become eligible to draw retired pay. (*Select type of coverage below.*)

The types of coverage that can be selected are listed in block 13 with the instruction to “Select one”: spouse, spouse and child(ren), child(ren) only, former spouse, former spouse and child(ren), and natural person with an insurable interest.

The original RCSBP Election Certificate shows that the applicant elected Option A in block 12 and did not select a type of coverage in block 13. Nor did he select a level of coverage (either “full retired pay” or reduced amount of retired pay”) in block 14. In addition, his spouse concurred in his election of Option A by signing the “Spouse Concurrence” section of the form before a notary public underneath the following language:

SPOUSE CONCURRENCE AND NOTARIZED SIGNATURE ARE REQUIRED FOR AN RCSBP ELECTION THAT DOES NOT PROVIDE FOR AN IMMEDIATE SPOUSE ANNUITY (OPTION C) BASED ON FULL RETIRED PAY. IN THE EVENT THAT CONCURRENCE IS REQUIRED, BUT NOT PROVIDED, RCSBP COVERAGE WILL BE ESTABLISHED FOR AN IMMEDIATE SPOUSE ANNUITY BASED ON FULL RETIRED PAY.[²] NOTE: IF THE MEMBER ELECTS OPTION A (DECLINING TO MAKE AN ELECTION UNTIL AGE 60) AND THE SPOUSE CONCURS, NO ANNUITY WILL BE PAYABLE IF THE MEMBER DIES PRIOR TO REACHING AGE 60. WHEN THE MEMBER REACHES AGE 60, AN SBP ELECTION FOR LESS THAN A FULL SPOUSE ANNUITY REQUIRES THE MEMBER’S SPOUSE TO CONCUR. [Emphasis added.]

I HEREBY CONCUR IN MY SPOUSE’S RCSBP ELECTION AS INDICATED. I HAVE READ AND UNDERSTAND THE INFORMATION THAT EXPLAINS THE OPTIONS AVAILABLE AND THE EFFECTS OF THOSE OPTIONS. I AM AWARE THAT MY SIGNATURE CONSTITUTES CONCURRENCE AND THAT I MAY NOT CHANGE MY MIND AT A LATER DATE REGARDING THE RCSBP ELECTION.[³]

² A reservist with a spouse is automatically enrolled in the RCSBP under Option C based on the reservist’s full retired pay unless he declines to elect coverage within 90 days of receiving his 20-year notification and his spouse concurs in that decision. 10 U.S.C. § 1448(a)(2)(B).

³ An RCSBP election “is irrevocable if not revoked before the end of the 90-day period” following notification that the reservist has completed 20 satisfactory years of service toward retirement. 10 U.S.C. § 1448(a)(4). However,

The proposed substitute RCSBP Election Certificate submitted by the applicant shows that on March 12, 2018, with his spouse's concurrence, he elected spouse coverage under Option B with a standard annuity based on 55% of his full retired pay beginning on the date of his death or at age 60 if he dies before age 60.⁴

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 7, 1986. Although unmarried upon enlistment, an insurance form in his record indicates that he had already married his current spouse by [REDACTED]. The applicant served on active duty for more than eight years until he was discharged on June 27, 1994.

Approximately six years later, the applicant enlisted in the Coast Guard Reserve on April 26, 2002, was assigned to the Selected Reserve, and performed extended periods of active duty totaling approximately seven more years until he was released to inactive duty in 2009. Then he drilled regularly in the Selected Reserve and earned satisfactory years of service toward a Reserve retirement until he was transferred to the ISL on January 24, 2018.

Before his transfer to the ISL, in a letter dated March 6, 2014, the applicant was notified that he had completed 20 satisfactory years of service toward a Reserve retirement:

1. You are hereby notified that you have completed at least twenty years of satisfactory federal service in accordance with [10 U.S.C. § 12732]. You will be eligible to receive retired pay when you reach age 60 [in April 2025].
2. You must continue to reenlist or extend your current enlistment contract until you are approved for transfer to retired without pay (RET-2) status, place in the Inactive Status List (ISL), or reach age 60.
3. Public Law 106-398 entitles you to participate in the Reserve Component Survivor Benefit Plan (RCSBP). The RCSBP permits you to provide an annuity for your spouse, spouse and children, children alone, or persons with an insurable interest in the event you die before reaching age 60. It is very important that you carefully read the options provided in the RCSBP Election Certificate (CG-11221, enclosure (1)). **By law, you must make your choice within 90 days of the date of this letter.** [Emphasis in original.]
4. Enclosure (2) is your U.S. Coast Guard Reserve Retirement Point Statement (CG-4175A). Retirement points accrue up to age 60 unless you are placed in ISL or RET-2. After reaching age 60, no retirement points can be accrued unless you are recalled to active duty.
5. Safeguard this letter of notification and a copy of your RCSBP Option Election Certificate because they will be used to determine your retired pay when you reach age 60. Provide a copy of this notification to your unit Commanding Officer.

Enclosure (1) to the 20-year letter is the "Reserve Component Survivor Benefit Plan (RCSBP) Guide and Form CG-11221." The first page of this document states the following:

subsequent events, such as divorce, marriage, and the birth of a child, may allow a member to change his election within one year of the event. 10 U.S.C. §§ 1448, 1450.

⁴ A member can elect a "standard" annuity based on the full amount of his retired pay multiplied by 55% or a "reduced" annuity based on a fixed dollar amount of his retired pay multiplied by 55%. 10 U.S.C. §§ 1447(6), 1451.

Introduction: Upon completing 20 years satisfactory service (i.e., earn at least 50 points per year for 20 years), a reservist is vested for retirement. He/she must make an irrevocable election concerning the Reserve Component Survivor Benefit Plan (RCSBP). RCSBP is the only program which allows a military member to leave a percentage of his/her future retired pay as a monthly annuity to the member's family. This Plan does not make a single lump sum payment like insurance, but instead pays benefits to qualified survivors each and every month. Read this information carefully, and if married discuss this with your spouse. Gather facts and data unique to your situation, consider the options, and then decide what is best for you.

Important Deadline: Within 90 days of receipt of your 20-year letter, you **MUST** make an irrevocable election concerning RCSBP. If you fail to make an election within 90 days, and you have a spouse or a dependent child, you will **AUTOMATICALLY** be enrolled in RCSBP under Option C (explained below). If you elect not to participate in RCSBP Option C at the maximum level, your spouse must concur with your election and the spouse's signature must be notarized.

RCSBP Election Options:

Option A (defer survivor annuity election, or decline coverage until retirement age). Under this option, if you die before reaching retirement age (age 60, unless you serve on active duty on or after January 29, 2008 which qualifies for early reserve retirement), then no survivor annuity is payable. If you survive until retirement age, at that time, you may elect to participate in SBP as any other member becoming eligible for retired pay. If you choose Option A, then spousal concurrence is required (and notarized). Two important things to remember are:

- (1) There is no annuity coverage between the date you complete 20 years satisfactory service and the date you become entitled for retired pay.
- (2) If you die before the age at which you are eligible to draw retired pay, your spouse/dependents will receive exchange and commissary benefits immediately, but will not become eligible for medical benefits until your 60th birthday.

Option B (deferred annuity). Under this option, you provide coverage for an annuity to begin on the date you are eligible to draw retired pay, or on the day after your death, whichever is later. If you choose Option B, then spousal concurrence is required (and notarized).

Option C (immediate annuity). Under this option, you provide coverage for an annuity that begins immediately upon your death regardless of your age at the time of death. For example, if you elect Option C at age 45 and die at age 47, your beneficiary will receive an annuity effective the day after your death. [Emphases in original.]

Subsequent pages of the document include/repeat the following information:

- “If option A is elected at time of 20 year satisfactory service letter, and spouse concurs, member will have an opportunity to elect into the Survivor Benefit Plan (SBP) at age 60.”
- **“NOTE: If Reservist declines RCSBP at completion of 20 years (elects Option A with spouse concurrence), and dies before reaching age 60, the survivors will not be entitled to receive a Coast Guard annuity.”** (Emphases in original.)
- Premiums are not collected until the reservist begins receiving retired pay. The premiums will be higher if either Option B or C is elected. The additional cost is called the Reserve Portion Cost, and it is “computed to account for the added level of coverage provided to the member prior to reaching retirement age” and depends on the reservist's age and the age of the beneficiaries when the election is made.
- Examples provided show that with exactly \$1,000 in monthly retired pay, if the reservist and his spouse were ages 45 and 43, respectively, at the time of election and they had one

10-year-old child, the monthly premium deducted from the retired pay for “spouse and child” coverage would be about \$65 if they had elected Option B and about \$73 if they had elected Option C, whereas if the reservist had elected Option A but then elected coverage at age 60, the premium would be about \$46.

Ten weeks later, on May 15, 2014, the applicant and his spouse signed a notarized RCSBP Election Certificate (form CG-11221) on which he elected Option A in block 12, with her concurrence, and so declined to elect coverage until he reached age 60. In completing the form, the applicant did not elect a type of coverage (e.g., spouse coverage) in block 13 or a level of coverage in block 14.

VIEWS OF THE COAST GUARD

On October 18, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG alleged that the application was untimely and noted that “[b]eyond indicating that he and his spouse had a lack of understanding what they were signing when selection option ‘A’, the applicant has not set forth reasons in the application why it is in the interests of justice for the Board to consider the application.” The JAG stated that because the applicant failed to justify his delay and his request is unlikely to prevail on the merits, the Board should deny the case as untimely.

The JAG stated that on May 15, 2014, both the applicant and his spouse signed an RCSBP Election Certificate on which the applicant elected Option A, “which is a declination to make an election until the date he is eligible to draw retired pay.” Therefore, if he dies before age 60, his survivors will not be entitled to an annuity. If he attains age 60, he will be able to elect regular SBP coverage and pay SBP premiums, but he will not have to pay the higher Reserve premiums because he did not elect coverage under either Option B or Option C.

The JAG stated that reservists’ elections are generally irrevocable by law in accordance with 10 U.S.C. § 1448(a)(4). And the applicant has not alleged or shown that the Coast Guard committed an error in notifying him of his options or in processing his RCSBP election. Although the applicant alleged that he had a limited amount of time in which to make the election, he was provided the 90 days allowed by law, he was sent the RCSBP Guide, and there is no evidence that he contacted the Coast Guard with any questions about his options. The JAG stated that in the RCSBP Guide, the Coast Guard provided the applicant with “reasonable explanatory information about the program,” and he did not seek further assistance. The JAG further stated that

[t]he RCSBP, which converts to SBP coverage at retirement, is at base level an insurance program/annuity that relies in part on the premiums paid and the risk taken by those members who elect to participate. SBP rates are generally less expensive than commercial plans but SBP coverage, nevertheless, requires the payment of premiums. The irrevocability provisions contained in the law are necessary to ensure continued viability of the program.

The JAG stated that the “Board has, generally, upheld the irrevocability provisions contained in the law, finding exception for correcting a record in favor of change if not doing so under the circumstances would amount to an injustice.” The JAG noted in this regard that the Board has sometimes granted relief when veterans have failed to timely change “spouse” coverage to “former spouse” coverage despite divorce decrees that required them to do so. The JAG stated that the facts in this case are not similar to those in which the Board has previously granted relief. In this case, the JAG stated, the applicant “made an informed decision about coverage, the same one that many members who elect no coverage or less than full coverage make.” Therefore, the JAG concluded, the applicant has not sustained his burden of proving by a preponderance of the evidence that his election of Option A was erroneous or unjust.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 1, 2018, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. After being granted extensions of the time to respond, the applicant submitted his response on March 31, 2019.

The applicant stated that his request is not based on his current health: “I am in good health and have not been diagnosed with any terminal illness. I do not take any medications nor am I being treated for any medical condition.”

The applicant stated that his application is timely because he learned about his error with regard to his May 2014 election in March 2018, when he was doing some retirement planning and talking to a coworker, who informed him of the consequences of electing Option A. The applicant stated that “[m]ost of my time was served on active duty and I assumed that a final election could be made when I decided to retire which would be similar to any active duty member.”

The applicant stated that he erroneously elected Option A in 2014 because his 81-year-old uncle’s health had started to decline and he “was hospitalized and had multiple surgeries.” His uncle was in the Intensive Care Unit in February 2014 and “not expected to live.” Then, however, he was placed in long-term assisted care (LTAC). The applicant stated that

[w]ith no other family members available, my wife and I were responsible for handling his financial and medical decisions. A medical and financial power of attorney were issued to me in February 2014. March 2014, while my uncle was still in an LTAC facility, I received my RCSBP in the mail. March 2014, decisions had to be made to move my uncle from an LTAC facility to a skilled nursing home which required me to screen and visit several facilities. April 2014 my uncle was released from a skilled nursing facility and required 24-hours a day care until June 2014 when he returned back to the hospital with more complications. This constant care and decision making for my uncle was my sole responsibility until his death in May 2016.

Conclusion: At the time my wife and I made this election, we were dealing with a very stressful threatening condition of a family member. I’m not denying but I do not recall receiving an RCSBP guide along with my election certificate CG-11221. Furthermore, Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate (CG-11221 (08-10)) section IV – Option and Election – Option A does not clearly state that in the event of my death that my spouse is not entitled to survivor benefits.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years of the applicant's discovery of the alleged error or injustice.⁵ The applicant alleged that he discovered the error and injustice in his record in March 2018, when a colleague informed him that under Option A, his spouse would receive no annuity if he died before age 60 in 2025. The record shows, however, that the applicant not only elected Option A in block 12 of the RCSBP Election Certificate (form CG-11221) on May 15, 2014, but also did not select any type of coverage in block 13 or a level of coverage in block 14.⁶ In addition, the Spouse Concurrence section of the form states, "IF THE MEMBER ELECTS OPTION A (DECLINING TO MAKE AN ELECTION UNTIL AGE 60) AND THE SPOUSE CONCURS, NO ANNUITY WILL BE PAYABLE IF THE MEMBER DIES PRIOR TO REACHING AGE 60." In light of the language on the form and the fact that the applicant did not select spouse coverage in block 13 or a level of coverage in block 14, the Board finds that the preponderance of the evidence shows that the applicant and his spouse knew when they completed the RCSBP Election Certificate on May 15, 2014, that he was not electing or selecting spouse coverage under the RCSBP. Therefore, the preponderance of the evidence shows that the application was not timely filed.

3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁷ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"⁸ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review."⁹ Pursuant to these directions, the Board finds the following:

a. The applicant did not justify his delay in applying to the Board except to state that he did not discover the error until March 2018.

b. A cursory review of the merits of this case shows that the applicant's claim lacks potential merit. The applicant is a chief [REDACTED] in the Reserve, and there is no evidence supporting his claim that he and his spouse misunderstood the form in May 2014 or had insuffi-

⁵ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁶ If after electing Option A, the applicant had selected spouse coverage in block 13 or a level of coverage in block 14, it would have been erroneous and voided the form, but it would also have supported his claim that he thought he was electing spouse coverage under the RCSBP on May 15, 2014.

⁷ 10 U.S.C. § 1552(b).

⁸ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁹ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

cient time to consider the matter. Although he alleged that he thought Option A included spouse coverage, the form does not allow a reservist to select any type of coverage after electing Option A in block 12, and the applicant did not elect spouse coverage in block 13. Nor did he select a level of coverage in block 14. If he thought that he would receive coverage with Option A, he would presumably have selected a type and level of coverage. Moreover, his spouse signed the Spouse Concurrence section of the CG-11221 before a notary public and underneath a paragraph that states in part: “NOTE: IF THE MEMBER ELECTS OPTION A (DECLINING TO MAKE AN ELECTION UNTIL AGE 60) AND THE SPOUSE CONCURS, NO ANNUITY WILL BE PAYABLE IF THE MEMBER DIES PRIOR TO REACHING AGE 60.” This CG-11221 dated May 15, 2014, is presumptively correct,¹⁰ and there is insufficient evidence to overcome the presumption.

4. Accordingly, the Board will not excuse the application’s untimeliness or waive the statute of limitations to conduct a thorough review of the merits. The applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ 33 C.F.R. § 52.24(b); see *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties “correctly, lawfully, and in good faith.”).

ORDER

The application of [REDACTED], USCGR, for correction of his military record is denied.

November 1, 2019

